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No. 541

In the Supreme Court of the United States

OCTOBER TERM, 1960

PIASECKI AIRCRAFT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
RICHARD J. SCUPI,
Attorney,
National Labor Relations Board, Washington 25, D.C.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–36a) is reported at 280 F. 2d 575. The decision of the National Labor Relations Board (P. 187a–239a, 249a–255a)[1] is reported at 123 NLRB 348.

JURISDICTION

The decision of the court below was entered on June 20, 1960. On August 26, 1960, the decision was amended, and a petition for rehearing filed by peti-

[1] The references "P." and "B." refer to those portions of the record printed as appendices to the briefs below of petitioner and the National Labor Relations Board, respectively.

tioner was denied (Pet. 35a–36a). The petition for a writ of certiorari was filed on November 23, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the purchaser of a manufacturing plant violated Section 8(a)(3) of the National Labor Relations Act by rejecting the application of the former employees for new employment because of their union membership.

2. Whether the Board properly concluded that, in the circumstances of this case, the initial unlawful refusal to hire the former employees was not excused by their failure to respond to a subsequent invitation for a job interview.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2–3 of the petition.

STATEMENT

A. THE BOARD'S DECISION

As detailed in our brief in opposition to the petition in No. 466, pp. 2–7 (see note 2), to which we respectfully refer the Court, the Board found that Bellanca Aircraft Corporation sold its plant and

[2] The petition of the Union, with respect to another aspect of the case, was denied by this Court on December 5, 1960, in *International Union* v. *National Labor Relations Board*, No. 466, this Term.

equipment to petitioner Piasecki, and that, before Piasecki took over, Bellanca terminated the employment of its former employees and the outstanding bargaining contract with their representative, the United Automobile Workers. In hiring new employees, Piasecki discriminated against the former Bellanca employees because of their membership in the Union. The Board held that Piasecki was not obligated to bargain with the Union as the successor of Bellanca, but its refusal to hire the former Bellanca employees violated Section 8(a)(3) of the Act. To remedy the violation found, the Board required Piasecki, *inter alia*, to offer immediate employment with back pay to the 133 former Bellanca employees found to be discriminated against. The Union, by its petition in No. 466, unsuccessfully sought to challenge the propriety of the Board's conclusion that Piasecki was not obligated to bargain with it as Bellanca's successor.[3] Piasecki seeks by the instant petition to challenge the propriety of the back pay requirement imposed by the Board.

The facts relevant to the latter issue are as follows:

By November 17, 1956, 135 former Bellanca employees had executed copies of the following form, which was furnished by the Union (P.A. 193a–194a; B. 287b, 396b):

[3] The Board, however—noting that there was no doubt of the Union's majority among the former Bellanca employees—imposed a bargaining requirement as part of its remedy for the violation of Section 8(a)(3). See the Board's brief in opposition in No. 466, p. 7.

PIASECKI AIRCRAFT CORPORATION
International Airport
Philadelphia, Pennsylvania
DEAR SIRS:

This is to advise you that I am applying for employment with your Corporation at your New Castle plant.

I shall be available for such employment with you on and after November 24, 1956.

I am submitting under separate cover (or have previously submitted) your standard employment application form, which was mailed to me by your Corporation.

My submission to you of such application form for employment by your Company is not to be construed as any waiver by me of any rights which have accrued to me or will accrue to me under the June 1, 1955 contract by and between the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America and its Local No. 840 and the Bellanca Corporation and/or the Labor Management Relations Act of 1947.

Signature _____
Home Address _____
City and State _____
Bellanca Corp. _____
Badge Number _____

On November 17, the Union forwarded all of these forms to Piasecki with the following covering letter (P. 194a–195a; B. 18b–20b, 73b, 393b–395b, P. 121a):

PIASECKI AIRCRAFT CORPORATION

* * * * *

DEAR SIRS:

In a meeting between representatives of our Union and the Bellanca Corporation held Fri-

day, November 16, we were officially advised for the first time that commitments and arrangements for your corporation to take over the physical assets of Bellanca's New Castle facility, including real estate, machinery, equipment, supplies and certain work in progress, have been in existence since approximately November 1. We were further informed that you will take physical possession on November 23, 1956.

Therefore, we are transmitting to you herewith, 135 letters applying for employment at your New Castle, Delaware plant which have been individually executed by the members of Local 840 currently employed by the Bellanca Corporation at the New Castle facility. An alphabetical list of the senders of such letters is also attached for your convenience of reference. All of these employees will be available for such employment with you on and after November 24, 1956.

In line with our letter to you on November 13, 1956, wherein we stated our intention to cooperate with you as the successor management of the New Castle plant, we have also urged our membership to complete and return to you your standard "application for employment form." Your Corporation had mailed such forms to our members at Bellanca on or about October 30, 1956. We trust you have received same.

Further, in view of the information given to us by Bellanca, we desire to meet with your representatives on either Tuesday, November 20 or Wednesday, November 21. In such meeting, we desire to discuss your immediate and

future manpower requirements at the New Castle plant and make appropriate arrangements for the recall of Bellanca employees to such jobs in accordance with their seniority as established in the Agreement between Bellanca Corporation and the International Union, UAW and its Local 840, dated June 1, 1955, and also to establish a basis for further collective bargaining between the parties.

Will you kindly advise us promptly as to the date, place and time you will find most convenient for such meeting?

Piasecki received this letter on Monday, November 19, but made no reply (P. 195a; B. 20b, 335b–337b). On November 24, Piasecki advertised in the two principal Wilmington newspapers that job applicants would be interviewed in the New Castle plant the next day (P. 197a). But when the former Bellanca employees appeared at the plant on November 25 and 26 in an effort to obtain job interviews which were being given, petitioner locked them out of the plant (P. 197a–201a; 218a–227a; 230a–237a). At these interviews, most of the supervisory personnel of the Bellanca plant and five of its clerical employees were hired by petitioner (P. 198a, 217a). The plant supervisor of Bellanca, whom petitioner had rehired, told a union representative during the lock-out: "You know how [the president of Piasecki] feels * * *.[4] If you and the other union guys are really interested in your people, if you really want to help your people and you want

[4] The trial examiner found that Piasecki's president manifested hostility to the Union throughout his testimony (P. 227a–228a).

them to get in this plant, you will get away from here today" (P. 225a). On the evening of November 26, the Bellanca employees, having failed to obtain interviews or assurance of employment by Piasecki, voted at a union meeting to establish a picket line at the New Castle plant and to file unfair labor practice charges with the Board (P. 201a; B. 145b–146b, 315b–316b). Picketing started the next day, and was in progress at all material times thereafter (P. 201a; B. 146b, P. 77a–78a).

Though Piasecki admittedly continued to have job openings "in almost every category," it still did not contact the Bellanca employees. Instead, after November 26, it moved its interviewing facilities to Philadelphia, over 35 miles from New Castle (P. 203a; B. 27b, 44b, 55b). It also continued to run newspaper advertisements "all the time" to attract additional applicants for these openings (P. 203a; B. 44b). Finally, on November 30, Piasecki sent a letter to each of the employees who had formerly worked for Bellanca announcing that interviews were being conducted every day between 9:00 a.m. and 4:00 p.m. in Philadelphia, and informing the recipient that, if he would present himself there, he would be given "consideration for immediate employment at New Castle" (P. 202a–206a; B. 376b, 426b). None of the Bellanca employees appeared for an interview.

On these facts, the Board concluded that the former Bellanca employees, had, on or about November 19, applied for new employment with Piasecki, and that Piasecki, by locking out the employees and other action, had in effect denied the applications because

of their membership in the Union, thereby violating Section 8(a)(3) of the Act (P. 232a, 250a).

B. THE DECISION OF THE COURT OF APPEALS

In the court below, petitioner contested the Board's Section 8(a)(3) finding and the back pay remedy provided therefor on two grounds: (1) the refusal to hire the former Bellanca employees was privileged because they did not make an unconditional application for new employment, but rather requested their old jobs, which had been abolished, and conditioned this request upon Piasecki's recognition of the Union, which it was not obliged to grant; and (2) even if there were an unlawful refusal to rehire the Bellanca employees at the outset, this was cured by Piasecki's offer of November 30, which the employees failed to accept.

The court found that substantial evidence sustained the Board's finding that the Bellanca employees had applied for new employment (Pet. 31a, 36a). The court stated (Pet. 31a):

> * * * All applications were on Piasecki's forms. At most the letter of transmittal, prepared by the Union, contained notification that the applications were not to be construed as a waiver of any rights under the Union's contract with Bellanca, and were not conditioned upon a recognition of the Union or demands for restoration of jobs with appurtenant rights established under the Union contract. The workers were applying for jobs with a new employer. The confusion which existed in their minds as to their status was justified by the turn of events and the realization that the

> Union benefits, which had been theirs for so long a period, had been brought to an end was difficult for them to conceive. It was natural for them to attempt to preserve the hope that somehow their union benefits would survive Piasecki's purchase of Bellanca. Therefore, they made it clear that their applications should not mean that they waived anything that might inure to them thereunder. This certainly did not detract from their unconditional applications for jobs.

The Court further found that, in the circumstances of this case, the Board could properly conclude that the initial discrimination was not cured by Piasecki's job interview offer of November 30 (Pet. 31a):

> The former Bellanca workers, long represented by the Union, undoubtedly felt ties to it and it is not strange that they should have associated themselves with it in their endeavor to achieve continuity of employment with Piasecki. On both November 25 and November 26 it was made known to them that such association made them ineligible for work in the eyes of Piasecki. The incidents on these days preclude the idea that upon presenting themselves for interview they would achieve employment notwithstanding their union memberships. Enough had occurred to convince each worker of the futility of making any such attempt. The advertisements requiring the workers to report to the Philadelphia plant for interviews and the invitations addressed to them on November 30 did not serve to dispel the definite conviction firmly fixed that former Union members would not be granted employment. * * *

ARGUMENT

1. Petitioner's contention (Pet. 10–13) that the former Bellanca employees did not make an unconditional application for new employment, but requested reinstatement to their former jobs, raises only an evidentiary question which does not warrant review by this Court. There is no conflict with any prior decisions, for the cases cited by petitioner (Pet. 10) involved situations where the employees were found to have demanded reinstatement to their former jobs. Since the Board found—based on ample evidence (see *supra*, pp. 3–7)—that the employees here applied for new employment, those decisions are distinguishable on their facts, as the court below specifically recognized in differentiating its own earlier holding in *National Labor Relations Board* v. *Textile Machine Works*, 214 F. 2d 929 (Pet. 36a). Nor is there merit to petitioner's suggestion (Pet. 10–11) that the court below departed from the objective standards used in the earlier cases by making a "subjective" inquiry into the employees' state of mind. Rather, the Board's finding largely rests upon an interpretation of documents which the employees sent to petitioner.

2. It is a settled principle that employees unlawfully refused employment need not make further applications for work where the circumstances indicate that these attempts would also be futile.[5] Thus,

[5] See *National Labor Relations Board* v. *Swinerton*, 202 F. 2d 511, 515 (C.A. 9), certiorari denied, 346 U.S. 814; *National Labor Relations Board* v. *Arthur G. McKee & Company*, 196 F. 2d 636 (C.A. 5), enforcing 94 NLRB 399, 413–444; *National Labor Relations Board* v. *Daniel Hamm Drayage Company*, 185 F. 2d 1020 (C.A. 5), enforcing 84 NLRB 458, 460.

whether petitioner's liability for reinstatement and back pay to the employees unlawfully refused employment on November 25 and 26 was tolled by the November 30 invitation to them to apply again for work, depends on whether the circumstances here justified the conclusion of the Board and the court below that the employees could reasonably view the new invitation as still contingent upon their abandonment of the Union. This is likewise an evidentiary issue which does not warrant review by this Court.

In any event, the Board's conclusion was clearly a permissible one. As the trial examiner found (P. 232a): "it is manifest * * * that the [petitioner] was determined at all costs to avoid hiring the Bellanca employees who were associated with the Union and the employment of whom in large numbers would result in the [petitioner's] being saddled with a union majority and the obligation to bargain with the UAW." This attitude was clearly revealed to the former Bellanca employees by the lockout on November 25 and 26 and the failure of their other efforts to obtain employment or even interviews. The only change indicated by petitioner, between its earlier invitation for interviews which resulted in the lockout and the invitation of November 30, was to shift the interviews from the New Castle plant itself to Philadelphia, over 35 miles away. Thus the employees had no reason to believe that petitioner had altered its position and would hire them despite their Union membership.

Petitioner's contention (Pet. 13-16) that the record does not show the November 30 offer to have been in bad faith is beside the point. The issue is not whether there was anything unlawful about the offer, but whether it was sufficient to apprise the employees that petitioner had abandoned the discriminatory hiring policy manifested only a few days earlier. Because it was not sufficient, it cannot, no matter how well intentioned, alter petitioner's back pay liability.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
RICHARD J. SCUPI,
Attorney,
National Labor Relations Board.

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